IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

LYUBOV R. Y.,

Plaintiff,

v. Civil Action No. 6:20-CV-1443 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

APPEARANCES: OF COUNSEL:

FOR PLAINTIFF

OFFICE OF PETER W. ANTONOWICZ
148 West Dominick Street
Rome, NY 13440

PETER W. ANTONOWICZ, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.
625 JFK Building
15 New Sudbury St
Boston, MA 02203

CANDACE LAWRENCE, ESQ.

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the

Commissioner of Social Security ("Commissioner"), pursuant to 42 U.S.C. § 405(g), are cross-motions for judgment on the pleadings.[1] Oral argument was heard in connection with those motions on June 22, 2022, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

ORDERED, as follows:

1) Defendant's motion for judgment on the pleadings is GRANTED.

2) The Commissioner's determination that the plaintiff was not

[1] This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order, once issue has been joined, an action such as this is considered procedurally as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.

3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

David E. Peebles
U.S. Magistrate Judge

Dated: June 24, 2022
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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LYUBOV Y.,

Plaintiff,

-v- 6:20-CV-1443

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID E. PEEBLES
June 22, 2022
100 South Clinton Street, Syracuse, New York

For the Plaintiff:
(Appearance by telephone)

LAW OFFICE OF PETER W. ANTONOWICZ
148 West Dominick Street
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BY: **PETER W. ANTONOWICZ, ESQ.**

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(Appearance by telephone)

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(The Court and all parties present by telephone. Time noted: 11:11 a.m.)

THE COURT: Let me begin by thanking both counsel for excellent and spirited presentations.

Plaintiff has commenced this proceeding pursuant to 42, United States Code, Section 405(g) to challenge an adverse determination by the Acting Commissioner finding that she was not entitled to the disability insurance benefit, Title II benefits, that she applied for.

The background is as follows: Plaintiff was born in July of 20 -- I'm sorry, 1970. She's currently 51 years of age. She was 47 at the alleged onset of her disability in March of 2017. Plaintiff is originally from Belarus and came to the United States in roughly 2018 -- no, I'm sorry, she has been -- as of 2018, she had been here for 29 years. Plaintiff stands 5'6" in height and weighs 238 pounds, which qualifies her as obese. Plaintiff attended college in Latvia and graduated with some sort of culinary degree in baking and/or cooking. While in school, she attended regular classes.

Plaintiff lives in Deerfield, New York. It's unclear, but it appears she may be separated. She has six children, all or some of whom in 2018 were residing with her. Plaintiff drives. Plaintiff worked as a nurse's aide between May of 2004 and March of 2017. She was engaged in home care for the disabled. Plaintiff suffered a Workers' Compensation

on-the-job injury on January 11, 2017, when she slipped on ice causing injury to her head, neck, back, and bilaterally to her legs.

Physically, plaintiff suffers from degenerative disc disease of the cervical and lumbar spine, hypertension, obesity, and a history of kidney cysts. The plaintiff underwent MRI testing of the cervical and lumbar spines in January of 2018 and again, it appears, in April of 2019 with mild to moderate results. Plaintiff refused, however, an EMG nerve conduction study and injections, claiming that she is afraid of needles. Plaintiff mentally suffers from depression and anxiety, but has undergone no specialized treatment or psychiatric hospitalization. Plaintiff has undergone chiropractic treatment, as well as physical therapy for her lumbar and cervical spine issues.

Plaintiff has treated with Mohawk Valley Nephrology for her history of kidney cysts, Slocum-Dickson Medical Group, including Dr. Kenneth Visalli, who's her primary caretaker, and Dr. Prasanna Kumar. She has also treated with neurologist, Mr. Ramesh Cherukuri, and on one occasion with Dr. Nicholas Qandah on February 5, 2018.

In terms of activities of daily living, plaintiff is able to dress, to bathe, although she requires assistance in the shower, groom, drive short distances, watch television, and spend time with family. Her family, however, does most of the

cooking, cleaning, and laundry.

Procedurally, plaintiff applied for Title II benefits under the Social Security Act on February 5, 2018, alleging an onset date of March 9, 2017. She claims disability based on back issues, high blood pressure, leg and arm pain, fibromyalgia, and kidney cysts. A hearing was conducted by Administrative Law Judge, or ALJ, Elizabeth Koennecke. ALJ Koennecke issued an unfavorable decision on February 20, 2020. That decision became a final determination of the agency on October 20, 2020, when the Social Security Administration Appeals Council denied plaintiff's application for a review. This action was commenced on November 23, 2020, and is timely.

In her decision, ALJ Koennecke applied the familiar five-step sequential test for determining disability. She first determined that plaintiff retains insured status through December 31, 2022. At step one, she concluded that plaintiff had not engaged in substantial gainful activity since March 9, 2017, her alleged onset date.

At step two, she determined that plaintiff does suffer from severe impairments that impose more than minimal limitations on her ability to perform basic work functions, including mild degenerative disc disease of the lumbar spine and the cervical spine, as well as hypertension.

At step three, ALJ Koennecke concluded that plaintiff's conditions do not meet or medically equal any of the

listed presumptively disabling conditions set forth in the Commissioner's regulations, specifically focusing on listing 1.04. After surveying the evidence of record, ALJ Koennecke concluded that plaintiff retains the residual functional capacity, or RFC, to perform light work as defined in the regulations with the exception that she is only able to occasionally stoop.

Applying that RFC finding at step four, ALJ Koennecke concluded that plaintiff is incapable of performing her past relevant work as a nurse assistant and proceeded to step five where she concluded based upon the Medical-Vocational Guidelines set forth in the Commissioner's regulations, and specifically guideline or Grid Rule 202.21, that plaintiff is not disabled.

In arriving at that determination and after noting the Commissioner's burden of proof at step five, ALJ Koennecke concluded that the additional limitation of only occasional stooping has little or no effect on the occupational base on which the grids are predicated, citing Social Security Ruling 83-10.

As you know, the Court's function in this instance is to determine two things, whether correct legal principles were applied and whether the resulting determination is supported by substantial evidence, which is defined as such relevant evidence as a reasonable mind would find sufficient to support a conclusion. As the Second Circuit has noted in *Brault v. Social*

Security Administration Commissioner, 683 F.3d 443 from the Second Circuit, 2012, this is a demanding, very deferential standard. And under that standard, once a fact is found by an ALJ, that fact can be rejected only if a reasonable factfinder would have to conclude otherwise.

In this case, the plaintiff raises three arguments. First, she claims error in the Administrative Law Judge's weighing of the medical evidence of record, specifically focusing on medical source statements from two treating sources, Dr. Kenneth Visalli and Dr. Ramesh Cherukuri. And that's spelled C-H-E-R-U-K-U-R-I, despite what I said earlier. She also notes that Dr. Wolf found moderate limitations that are inconsistent with light work, and further notes that there was no mention by the Administrative Law Judge of an IME report of Dr. Bradley Wiener who conducted an examination in connection with plaintiff's Workers' Compensation claim. The second argument raised is that the Administrative Law Judge improperly analyzed and considered plaintiff's subjective complaints of symptomology. And the third is that it was error for the Administrative Law Judge to rely on the grids or Medical-Vocational Guidelines without consulting with a vocational expert in order to determine at step five whether there was work available that plaintiff is capable of performing.

Because of the date on which this application in this

case was filed, the new amended regulations that took effect in March of 2017 apply to consideration of medical opinions in the record. Under those regulations, an ALJ does not defer or give any specific evidentiary weight, including controlling weight, to any medical opinions or prior administrative medical findings, including those from a claimant's medical sources, 20 C.F.R. Section 404.1520(c)(A). Instead, an ALJ must consider those opinions and apply relevant factors, including primarily supportability and consistency of those opinions. The ALJ must articulate how persuasive he or she found each medical opinion and must explain how he or she considered the supportability and consistency of those medical opinions. The ALJ may also, but is not required to, explain how he or she considered other relevant factors which are set forth in the regulations.

There are five opinions in the record concerning plaintiff's physical capabilities. The first is from -- and I'm not taking these necessarily chronologically, state agency consultant Dr. R. Pradhan from July 3, 2013. It appears in the record as part of Exhibit 2A and also is reiterated in Exhibit 9F. Essentially, that's at page 58 to 72 and 755 to 756. It concludes that plaintiff is capable of performing light work, except she can only occasionally stoop. It is fully consistent with the RFC determination. The Administrative Law Judge concluded that Dr. Pradhan's opinion was very persuasive at page 17.

I note that while Dr. Pradhan did not examine the plaintiff, nonetheless, his or her opinion being a state agency consultant familiar with the regulations and having reviewed available medical records can supply substantial evidence and can even trump a medical source opinion from a treating source, *Heim v. Commissioner of Social Security*, 2018 WL 1621521 from the Northern District of New York, March 29, 2018, *Camille v. Colvin*, 652 F. App'x 25 from the Second Circuit, 2016, and *A.D. v. Commissioner of Social Security*, 2018 WL 3232347 from the Northern District of New York, June 29, 2018.

The second opinion is from Dr. Kautilya Puri from August 9, 2017. It appears at 271 to 275 of the Administrative Transcript. Dr. Puri does find moderate limitations in plaintiff's ability to squat, bend, stoop, and kneel and mild limitations to lifting weights. The administrative -- I'm sorry, the Administrative Law Judge did find the opinion of Dr. Puri persuasive, but noted at page 17 that it would not preclude plaintiff's ability to perform light work.

The third is from Dr. Ivan Wolf, June 11, 2018. It appears at 748 to 754 of the Administrative Transcript. Dr. Wolf finds moderate limitations in plaintiff's ability to -- among other things, overhead motion of her arms, squatting, repetitive forward bending, kneeling, and climbing. The Administrative Law Judge concluded that the opinion was persuasive at page seven, but, again, did not preclude

plaintiff's ability to perform light work.

Dr. Kenneth Visalli issued a medical source statement on February -- December 13, 2019. It appears at 818 to 819. It is basically a checkbox form. It is extremely limiting. It limits plaintiff to, for example, lift and carry on an occasional basis less than five pounds, can only stand or walk without leaning or supportive device one hour or less, can only sit for four hours or less in an eight-hour workday, has severe limitations in reaching, handling, fingering, and feeling, and would be likely absent more than four days per month. The Administrative Law Judge found that the opinion was not persuasive, was not consistent with the record, and cited some examples of treatment notes and records that would not support Dr. Visalli's opinion.

The fifth was from Dr. Ramesh Cherukuri from January 2, 2020. It appears at 923 to 924. It is, again, on a checkbox form and very limiting, essentially similar to Dr. Visalli's in terms of the limitations noted. ALJ Koennecke found it was not persuasive or consistent with the record at page 18 of the Administrative Transcript.

In the first instance, of course, it is for the Administrative Law Judge to weigh conflicting medical opinions, *Veino v. Barnhart*, 312 F.3d 578, from the Second Circuit, 2002, and it is not the Court's function to reweigh the medical opinions.

In terms of supportability, as the Administrative Law Judge noted, the opinion of Dr. Pradhan that was relied on for the RFC determination is supported by MRI testing, which showed only mild to moderate abnormal findings, the fact that Dr. Cherukuri, plaintiff's neurologist, recommended only conservative treatment, the fact that plaintiff declined EMG and nerve conduction studies, as well as injections, the fact she was referred to physical therapy and chiropractic care, conservative -- relatively conservative treatment, and the fact that the treatment notes do not support the more significant limitations set forth in those two findings from medical source statements from plaintiff's physicians.

The only significant supporting treatment note, really, from Dr. Visalli occurs on the day that he rendered his medical source statement. Those two opinions are not consistent with the opinions of Dr. Cherukuri, Dr. Wolf, or Dr. Pradhan. It's -- there is an argument that was raised by the plaintiff that there are limitations in Dr. Puri and Dr. Wolf's medical source statements that were not adopted and included in the RFC. It's well established, however, that an ALJ is not required to adopt every portion of an opinion that is found to be persuasive. In this case, Dr. Pradhan's opinion was found very persuasive and does support the RFC finding.

I note, moreover, that if there was error in not including moderate limitations in standing, walking, sitting,

lifting, pushing, or pulling, that would be harmless. Such limitations do not preclude the ability to perform light work, *Raymonda C. v. Commissioner of Social Security*, 2020 WL 42814, Northern District of New York, January 1, 2020, and *April B. v. Saul*, 2019 WL 4736243 from the Northern District of New York, September 27, 2019.

I am unable to say that a reasonable factfinder would have to conclude that plaintiff cannot perform light work with only occasional stooping, *White v. Brault* -- *Berryhill*, I'm sorry, 753 F. App'x 80 from the Second Circuit, Court of Appeals, February 7, 2019, and *Brault*, which I cited earlier.

In terms of squatting and kneeling, limitations that were opined by Dr. Puri under SSR 83-14, climbing, kneeling, and crawling limitations have little or no effect on light work job base. Similarly, under Social Security Ruling 85-15, squatting and kneeling limitations would similarly have little effect. The moderate -- when it comes to the moderate limitation in reaching, the ALJ accepted Dr. Pradhan's opinion and, obviously, it is in conflict with one medical opinion, but it was for the ALJ to resolve that inconsistency. In any event, if it was error, it was harmless. It was plaintiff's burden to establish the limitation in the ability to overhead reach and that it would preclude light work, and there's no proof that a limitation -- a moderate limitation in overhead reaching would preclude light work, *Michael M. v. Saul*, 2019 WL 6611302 from

the -- from the Northern District of New York, December 5, 2019.

There was an argument that Dr. Wiener's opinion was not referenced in the -- in the ALJ's decision, which, of course, is true. Dr. Bradley Wiener issued an opinion after conducting an independent medical examination on October 25, 2017. It appears at 329 to 334 of the Administrative Transcript. The conclusion reached by Dr. Wiener is that the claimant demonstrates a temporary total disability, however, the claimant's disability is predominantly due to her non-orthopedic conditions. The claimant has poorly controlled hypertension, as well as significant subjective complaints of pain without objective corroboration. The conclusion that plaintiff is incapable of returning to work in any capacity and is temporarily totally disabled, it opines on an issue that is specifically reserved to the Commissioner and there's no duty for the ALJ to weigh that opinion, 20 C.F.R. Section 404.1520(b)(C)(3)(i). Although, I would agree that it probably would have been a better practice for the Administrative Law Judge to reference the opinion and to say just that. Nonetheless, I don't find error and if there was error, it is harmless error.

In terms of weighing plaintiff's symptomology, what we used to consider or call credibility, an ALJ is required to take into account any subjective complaints by a claimant of pain when a -- making a five step disability analysis, but is

not required to blindly accept the subjective testimony of a claimant. Instead, the ALJ retains broad discretion to evaluate a claimant's subjective testimony, including testimony concerning pain and when doing that, must consider a variety of factors which would ordinarily inform the issue of credibility in any context, including the claimant's credibility, his or her motivation, and the medical evidence in the record, and, of course, must explain the finding and must -- the finding must be supported by substantial evidence.

Relevant factors to be considered when evaluating a claimant's subjective symptomology claims include daily activities; location, duration, frequency, and intensity of the symptoms; precipitating and aggravating factors; type, dosage, effectiveness, and side effects of any medications taken; other treatment received; and other measures taken to relieve the symptoms.

In this case, the Administrative Law Judge followed the two-step protocol that is prescribed for evaluating plaintiff's reported symptomology. The decision of the Administrative Law Judge is entitled to considerable deference, *Penfield v. Colvin*, 563 F. App'x 839, Second Circuit, 2014.

In this case, ALJ Koennecke cited medical findings, mild to moderate findings on MRI testing, the refusal of plaintiff to undergo EMG and nerve conduction studies and to take epidural injections, the inconsistency of those opinions

with Dr. Wolf, Dr. Puri, Dr. Pradhan, and the conservative treatment recommended, including by his neurologist. I note that plaintiff was referred to a chiropractor on several occasions as reflected in 347, 764, and 784 of the Administrative Transcript. That, notwithstanding any argument to the contrary by the plaintiff, is a proper consideration when evaluating reports of pain, 20 C.F.R. Section 404.1529, *Riley v. Barnhart*, 2008 WL 10655336 from the Northern District of New York, 2008.

The last argument is the step five argument. Clearly, it is the Commissioner's burden at step five to determine the availability of work in the -- available in the national economy that plaintiff is capable of performing that can be satisfied by resorting to the medical vocational guidelines. The only additional nonexertional limitation in the RFC is occasional stooping, which under SSR 83-10 and 85-15, does not significantly reduce the job base on which the grids are predicated. Accordingly, I find no error in relying on the grids to find no disability.

In sum, I conclude that correct legal principles were applied in this case and the resulting determination is supported by substantial evidence. I will therefore grant judgment on the pleadings to the defendant and order dismissal of plaintiff's complaint.

Thank you, both. I hope you have a good afternoon.

MR. ANTONOWICZ: Thank you, Judge.

MR. LAWRENCE: Thank you.

(Time noted: 11:40 a.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, HANNAH F. CAVANAUGH, RPR, CRR, CSR, NYACR, NYRCR, Official U.S. Court Reporter, in and for the United States District Court for the Northern District of New York, DO HEREBY CERTIFY that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 22nd day of June, 2022.

s/ Hannah F. Cavanaugh

HANNAH F. CAVANAUGH, RPR, CRR, CSR, NYACR, NYRCR

Official U.S. Court Reporter